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No. 08-710

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICHARD THEUSCH, *et ux.*,

Petitioners,

v.

TAD BERG, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MINNESOTA

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Petitioners Richard and Sharon Theusch own real estate in Todd County, Minnesota, legally described as follows:

> A tract of land lying and being in Government Lot 2 and the Southwest Quarter of the Southwest Quarter (SW1/4 SW1/4) of Section Twenty-five (25), Township One Hundred Twenty-nine (129), North of Range Thirty-five (35) West of the 5th P.M. described as follows, to-wit: To find the point of beginning commence at the northeast corner of Lot 25 of Little Deer Beach Addition as per plat there of on file and of record in the office of the County Recorder of Todd County, Minn.; Thence Easterly and on the north line of said Lot 26 if extended to the point where said line, extended, intersects the west line of the Southwest Quarter of Section 25; thence due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25, which said point is the point of beginning of the tract hereby conveyed; thence continuing due east, three hundred sixty (360) feet; thence due South four hundred fifty (450) feet; thence due west five hundred feet more or less to the west line of said Southwest Quarter of said Section 25; thence north along said west line of said Southwest Quarter of said Section 25, one hundred fifty-six (156) feet more or less to the center line of said township

> road; thence Northeasterly along the centerline of said Township Road to the point of beginning. Reserving unto the Grantors, their heirs and assigns, however, an easement for ingress and egress over and across the westerly 33 feet of the tract hereby conveyed.

(App. 34c-5c). Petitioner Sharon Theusch purchased this property along with her former husband on a contract for deed in 1979. As the legal description indicates, the northwestern boundary of the Petitioners' property is the center line of a Township road. This Township road, Gateway Drive, formerly known as Bambi Trail, is at the center of the dispute in this matter.

Leslie Township contracts with Todd County for snow removal on Leslie Township roads. (App. 3a-4a). In the fall of 2003, Todd County informed Leslie Township that certain roads in Leslie Township have trees and brush that extend into the roadway and interfered with the operation of snow plow equipment. (App. 4a). One of the problem areas identified by Todd County was Gateway Drive. *Id.*

When Todd County contacted Leslie Township and informed them that trees and brush needed to be trimmed on the eastern portion of Gateway Drive, Leslie Township retained the services of E. Berg & Son Excavating to trim brush and trees along Gateway Drive. (App. 35c-36c). On November 14, 2003, Tad and Everett Berg went to Gateway Drive immediately adjacent to the Petitioners' property and began to remove brush and trees in the ditch of Gateway Drive that interfered with the use and maintenance of Gateway Drive.

(App. 4a). The trees that were cut were located on the slope of the ditch of Gateway Drive. (App. 36c). The Bergs cut trees only in the right of way of Gateway Drive. *Id.* Approximately 135 trees of various size, varieties and types, were cut and removed from the property. (App. 4a). The lumber from the cut trees was taken to the E. Berg & Son Excavating gravel pit near the Petitioners' property. (App. 36c). The lumber was offered to the Petitioners on numerous occasions. *Id.*

A substantial amount of evidence was presented at trial concerning the use and maintenance of Gateway Drive. Mrs. Theusch testified that snow has always been plowed off Gateway drive and it has been regularly graded since the Petitioners purchased the property in 1979. She also testified that the public has been using Gateway Drive for "quite some time" and for "years and years." Douglas Kaiser, Leslie Township Supervisor since 1997, is responsible for township road maintenance. Parts of his duties include conducting road inspections. Snow plowing and road grading has been conducted on Gateway Drive in excess of six years. (App. 36c-37c). During snow plowing, snow is regularly pushed from the traveled portion of Gateway Drive onto the ditch area where the Petitioners' trees and brush were cut. Gerald Beck, Leslie Township Supervisor from 1985 to 1992, testified at trial that maintenance was performed on Gateway Drive during the time he was a township supervisor. This maintenance included trimming trees and brush, gravelling, snow plowing, and grading. These types of maintenance were performed on Gateway Drive in excess of six consecutive years. Additionally, annual road inspections of Gateway Drive were conducted. Dwayne Zabel has owned property

along Gateway Drive since 1970. He has lived at this property along Gateway Drive since 1976. Mr. Zabel was present when Gateway Drive was established in 1971. Mr. Zabel was aware that the Gateway Drive right of way was 66 feet as it measured 33 feet from the centerline to the edge of the ditch.

Licensed surveyor Sam DeLeo also testified at trial. DeLeo surveyed Gateway Drive and the Petitioners' property. Deleo testified that the trees cut by the Bergs are located within eleven to twenty feet from the centerline of Gateway Drive. Gateway Drive has a ditch area that slopes down and away from the traveled portion of the roadway. Deleo testified that all of the tree stumps and cut brush were located on the area sloping down from the traveled portion of Gateway Drive into the ditch area. DeLeo also testified that the cut brush and tree stumps were located within 25 feet of the centerline of Gateway Drive. He also completed a Certificate of Survey which shows all the cut trees and brush within eleven to twenty feet from the centerline of Gateway Drive. (App. 121).

Petitioners offered limited testimony at trial concerning the amount of damages they claim to have suffered due to the removal of trees along Gateway Drive. Dale Gimbel, a real estate appraiser, testified that the Petitioners' property decreased in value by $18,900.00 due to the removal of the trees. However, he also admitted that the trees could be replaced with seedlings at a cost of one to five dollars per tree. He also testified that if the cut trees were replaced at the same density as they were prior to being cut; the replaced trees may not live. Carl Vogt, a forester, also

testified concerning damages. Vogt testified that the value of the cut trees was $7,472.00. He also testified that only forty trees should be planted in the area where the trees were cut. He stated that replacement cost for these forty trees was approximately $21,500.00 to $26,500.00. James Mohler, another forester, testified that replacement cost of the cut trees was $9,545.00.

Respondents offered a substantial amount of damages testimony at trial. First, Katie Himanga, a Certified Forester, offered her opinion concerning the cut trees. Ms. Himanga visited the site and viewed the stumps of the cut trees. She noted that some of the trees were dead before they were cut. The cut trees were all 25 years old or less. None of the trees were oak trees. The species of the cut trees were ash, maple, elm and box elder. All the cut trees were located on the slope away from the road down into the ditch along Gateway Drive. The density of the cut trees would have resulted in the death of a substantial amount of the trees. Typically, trees in a forest are ten to twenty feet apart when they mature. Only sixteen trees are necessary to replace the cut trees and maintain the screen of the cut trees. The cost of replacing the cut trees with sixteen properly spaced trees is $1,430.00. Ronald Zitzow, a certified real estate appraiser, performed a full appraisal on the Petitioners property. He determined that the diminution of value of the Petitioners property was $5,600.00 due to the removal of the trees.

Petitioners claims were tried before the court from August 9 and 10, 2006, in Todd County District Court, the Honorable William Walker presiding. On October 4, 2006, the trial court issued an order dismissing

Petitioners' claims without awarding damages. (App. 27b). Petitioners then moved the trial court for amended findings or, in the alternative, a new trial. On February 27, 2007, the trial court issued Amended and Restated Findings of Fact, Conclusions of Law and Order for Judgment awarding Appellants $5,600.00 for violating Minn. Stat. § 160.22 and dismissing Petitioners' remaining claims. (App. 33c-39c). The Court of Appeals affirmed the decision of the trial court, with the exception of the trial court's ruling that the Petitioners are entitled to an award of $5,600.00 for a violation of Minn. Stat. § 160.22. (App. 1c-26c). The Court of Appeals remanded the case to the trial court on the issue of whether the Appellants are entitled to damages pursuant to Minn. Stat. § 561.04. *Id.*

REASONS FOR DENYING THE PETITION

I. There Is No Compelling Need For The Court's Guidance On The Questions Presented.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." *Id.* Generally, the Supreme Court considers the following types of cases for review:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the

> accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Review is not routinely granted in a situation where the petitioner is seeking review of an "erroneous factual finding or the misapplication of a properly stated rule of law." *Id.*

First, it is difficult to determine the exact issue Petitioners are seeking review of in their Petition for Writ of Certiorari. Throughout Petitioners' Petition, they complain about numerous aspects of this matter and how it progressed through the court system. Petitioners allege their property was taken for public use without compensation. They also complain that their attorneys did not perform in accordance with Petitioners' instructions. Petitioners are also not satisfied with the surveyor they retained as an expert

witness in this matter. Petitioners' other complaints include, but are not limited to, the following:

1. a motion for summary judgment was not requested by either party;

2. Petitioners' attorney forgot her exhibits in her office during trial;

3. Respondents refused to answer interrogatories because they were untimely;

4. the trial court judge sustained many objections in favor of the Respondents;

5. that Petitioner Sharon Theusch was deposed;

6. Petitioners' attorney did not challenge testimony at trial;

7. a copy of Petitioners' Trial Memorandum, dated September 8, 2006, apparently has "void ww" written on the first page;

8. exhibits at trial were not marked ahead of time;

9. Petitioners' counsel failed to inform her clients that she was running for Todd County Attorney;

10. Respondents' counsel objected to testimony of Petitioners' expert witness; and

11. the trial court judge viewed Petitioners' property after the trial.

Ultimately, it appears that Petitioners are seeking review by the Supreme Court because they are not satisfied with the fact that Todd County District Court

and the Minnesota Court of Appeals did not rule in their favor. Also, it appears Petitioners are seeking review because they are unhappy with their attorneys. While it is difficult to determine from Petitioners' Petition for Writ of Certiorari, it appears their main concern is that a town road was established without their consent and without compensation.

Petitioners' Petition for Writ of Certiorari should be denied as this matter does not meet the criteria for discretionary review by the Supreme Court. First, the question presented is not an important question upon which the Supreme Court should rule. This case is not ripe for review because the Minnesota Supreme Court has addressed the issues in this matter. There is no conflict of law or need for the decisions of the Minnesota Supreme Court regarding this matter to be reviewed or overturned. The Minnesota Supreme Court recognized the statute of limitations provided for in Minn. Stat. §160.05 in *Shinneman v. Arago Township*, 288 N.W. 2nd 239 (Minn. 1980). This statute of limitations has been established law in the State of Minnesota for almost thirty years. Furthermore, in *Becker v. Mayo Foundation*, 737 N.W.2d 200 (Minn. 2007), the Minnesota Supreme Court determined that courts are prevented from creating new statutory causes of action that do not exist at common law when the legislature has not provided for a cause of action by the express terms of a statute or by clear implication. While the issues raised in this litigation are clearly important to the parties, they are issues which do not rise to a level which makes them compelling to the Supreme Court. Petitioners are simply dissatisfied with the application of established law by the Todd County District Court

and the Minnesota Court of Appeals to the facts of the instant case. Therefore, further review by the Supreme Court is not warranted.

II. Petitioners Interpretation Of Minnesota Law Concerning Dedication Of Township Roads Is Incorrect.

A. Petitioners Are Barred From Challenging The Existence Of Gateway Drive By The Applicable Statute Of Limitations.

Petitioners are apparently arguing that they are entitled to "just compensation" for the establishment of Gateway Drive. However, *Shinneman* provides that Minn. Stat. §160.05 contains a statute of limitations. When the statute of limitations runs, an owner is estopped from denying the existence of a public roadway. Whenever a road has been used and kept in repair for at least six consecutive years, the road is deemed to be dedicated to the public and an adjacent landowner is estopped from challenging the existence of a town road once the six-year period ends. See Minn. Stat. §160.05. In the instant case, Petitioners knew of the existence of the roadway at the time the property was acquired in 1979. In fact, the town road is referenced in the legal description of Petitioners' property. Petitioner's legal description states that border of their property runs "due east 140 feet more or less to the centerline of the township road running northeasterly and southwesterly thru said SW1/4 of said Section 25 . . . ." (App. 34c-35c). Since the Petitioners waited over twenty years to challenge the existence of the public roadway, they are barred from doing so. Therefore, Petitioners are not

entitled to compensation due to the establishment of a township road or vacation of a township road.

B. Gateway Drive Was Properly Established.

To prove common law dedication, one must show the property owner's express or implied intent to devote land to public use and the public's acceptance of that use. *Wojahn v. Johnson*, 297 N.W.2d 298, 306-7 (Minn. 1980). Ordinarily, whether the owner intended to dedicate the land and whether the public accepted the dedication are questions of fact. *Keiter v. Berge*, 18 N.W.2d 35, 38 (Minn. 1945). Once the public accepts the owner's dedication, the common law dedication is immediately effective. *Daugherty v. Sowers*, 68 N.W.2d 866, 868 (Minn. 1955). Unlike statutory dedication, no specific "waiting" period is required. *Wojahn*, 297 N.W.2d at 306-07 n. 4. In addition, dedication is irrevocable after public acceptance unless the public consents to revocation. *Keiter*, 18 N.W.2d at 38. Thus, an owner's dedication binds his or her successors in interest. *Daugherty*, 68 N.W.2d at 868-69.

Petitioners incorrectly argue that Gateway Drive was not established as a township road. Township roads in the State of Minnesota can be established through numerous procedures. Town roads can be dedicated through common law dedication and statutory dedication pursuant to Minn. Stat. §160.05. Petitioners argue that the Township did not acquire Gateway Drive until it attempted to map Township road pursuant to Minn. Stat. §164.35. This is an incorrect statement. Pursuant to Minn. Stat. §160.05, a township need only perform maintenance on a roadway that has been in use for six

consecutive years in order to dedicate it to the public use. Leslie Township performed maintenance for six consecutive years as early as the 1970's. Use and maintenance of the roadway in the 1970's was sufficient to establish Gateway Drive as a public roadway. A township does not have to affirmatively attempt to dedicate a roadway, other than simply maintaining it for a period of six continuous years. In this case, the trial court found that Gateway Drive was maintained in such a fashion and dedicated as a valid township road. The Minnesota Court of Appeals agreed.

Additionally, there was adequate evidence presented at trial to establish Gateway Drive as a township road by common law dedication. There is sufficient evidence of public use of Gateway Drive for in excess of thirty years. Intent to dedicate a township road is found when a landowner acquiesces to public use of land as a township road. Gateway Drive was used by the public without objection prior to the Petitioners ownership of property adjacent to Gateway Drive. Also, Petitioners apparently did not complain about the existence of Gateway Drive until they instituted the present action against the Respondents.

C. Various Laws Cited By Petitioners Are Inapplicable To The Instant Case.

Petitioners incorrectly state that Respondents are required to conform to the alternative road recording procedure pursuant to Minn. Stat. §164.35. As previously stated, additional methods of dedicating roadways are available to townships. A township may dedicate a roadway pursuant to common law dedication,

which does not require the roadway to be recorded with the respective County Recorder. Therefore, it is not necessary for Gateway Drive to be depicted on a recorded town road map. The fact that Leslie Township may have attempted to use a town road map in the early 1990's to identify all of its roadways does not mean that Gateway Drive was not dedicated in the 1970's through common law or statutory dedication. In fact, the trial court and the Minnesota Court of Appeals confirmed that Gateway Drive is a valid town road that was dedicated in the 1970's, prior to Petitioners' ownership of their property adjacent to Gateway Drive. (App. 8a-13a).

Petitioners also cite the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as support for their claim that they are entitled to just compensation for the alleged taking of their property for Gateway Drive. However, this Act clearly does not apply to the current situation. This Act only applies in situations where there is displacement or taking of property as a result of a federal program or project. In this case, there is no dispute that the only governmental entity at issue is that of Leslie Township, not the federal government. Also, there is no federal program involved. Therefore, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 does not apply to this matter.

Petitioners also argue that the State of Minnesota's eminent domain laws codified in Minn. Stat. §117.50 through §117.56 require that Petitioners be compensated for the alleged taking of their property for Gateway Drive. However, this section of the

Minnesota Statutes specifically excludes any taking of property relating to town roads. In fact, Minn. Stat. §117.012 specifically states that "this chapter does not apply to the taking of property under laws relating to drainage or to town roads when those laws themselves expressly provide for the taking and specifically prescribe the procedure." Minn. Stat. §117.012. Laws for establishment of a town road specifically provide for the taking of property and a procedure. A town road can be established through common law dedication through continued use of the property by the public without objection by the property owner and statutory dedication pursuant to Minn. Stat. § 160.05. This occurred with Gateway Drive in the 1970's. Since Petitioners failed to object to the establishment of Gateway Drive for over 20 years, they are, as previously stated, foreclosed from seeking compensation for an alleged taking of their property for Gateway Drive and denying the existence of Gateway Drive. Additionally, it appears that Petitioners were not even the record owners of the property at the time that Gateway Drive was established. Therefore, if any party was entitled to compensation for taking, it would be the owners of the property at the time the alleged taking occurred.

Ultimately, it appears that the Petitioners feel there was an erroneous factual determination or the misapplication of an established rule of law. Review of an erroneous factual determination or the misapplication of an established rule of law by this Court is only granted in rare occasions. Since this matter does not meet the criteria for review by Writ of Certiorari under the Rules of the Supreme Court of the United States, review should be denied.

III. Since Petitioners Have Not Properly Asserted A Claim For A Taking Of Private Property For A Public Use, This Matter Is Not Ripe For Review.

"Mandamus is the proper vehicle to assert a claim for inverse condemnation." *Vern Reynolds Constr., Inc. v. City of Champlin*, 539 N.W.2d 614, 616-17 (Minn. Ct. App. 1995), *review denied* (Minn. Dec. 20, 1995). An inverse condemnation action may require two separate factual determinations. *Alevizos v. Metropolitan Airports Commn.*, 317 N.W.2d 352, 360 (Minn. 1982) (Alevizos II). The mandamus court must determine first whether "there has been a taking or damage in the constitutional sense that it may compel the state to initiate condemnation proceedings." *Thomsen v. State*, 170 N.W.2d 575, 580 (Minn. 1969). If so, the matter goes before the commissioners to set the dollar amount of harm the owner has suffered. *Alevizos II*, 317 N.W.2d at 360; *See* Minn.Stat. 117.075 (1998). If appealed, the matter again goes to the district court fact-finder to address the amount of damages. *Alevizos II*, 317 N.W.2d at 360.

A. An Inverse Condemnation Claim Is The Proper Method of Seeking Compensation for A Taking.

It must also be noted that Petitioners did not bring a claim for a taking of their property for public use. In Petitioners' Complaint, they request payment of damages for replacement of trees and vacation of a portion of Gateway Drive. Petitioners did not seek money damages for a taking of their property for public use. In fact, even if Petitioners did intend to do this, the

procedure they chose is incorrect. The proper procedure for seeking compensation for a taking of private property for public use is through an inverse condemnation proceeding. An inverse condemnation proceeding must be commenced by seeking a Writ of Mandamus, asking a court to compel a governmental entity to begin condemnation proceedings. However, Petitioners did not choose to do this. Since Petitioners have failed to use the correct process for seeking condemnation and are now only bringing up the issue on appeal, they are not entitled to review of this matter.

IV. Quotations In Petitioners' Petition For Writ Of Certiorari Are Incorrect And Should Be Disregarded.

Additionally, Petitioners quote numerous state and federal cases in their Petition for Writ of Certiorari. Almost all of the quotations cited in the Petitioners' Petition for Writ of Certiorari are incorrect. Most of the quotations cited by Petitioners are not contained within the case Petitioners cite to. On page 17-18 of Petitioners' Petition for Writ of Certiorari, Petitioners cite to *State v. Sutton*, 65 N.W. 262 and claim it contains a quote which states: "When any court violates the clean and unambiguous language of the Constitution, a fraud is perpetrated and no one is bound to obey it." However, a review of *Sutton* reveals that no such quotation exists is the case. Furthermore, Petitioners cite to *Thompson v. Town of Berlin*, 91 N.W. 25 (1902), quoting "personal service of the notice of hearing on a petition to establish a town road 'must' be made on each occupant of the land which the proposed road will pass; i.e. upon the person having the actual possession and control of the

land." Once again, no such quotation exists in *Thompson*. Additionally, the following quotes are contained in Petitioners' Petition for Writ of Certiorari are incorrect:

> "Towns are liable for damages assessed to owners who lands are taken for town roads." *Woodruff v. Town of Glendale*, 1 N.W. 581 (1979);

> "These provisions have been interpreted to mean that property owners must receive the full diminution in the market value of their property occasioned by a taking." *Victor Co. v. State*, 186 N.W.2d 168 (Minn. 1971).

These quotations in Petitioners' Petition for Writ of Certiorari are simply not accurate. Petitioners claim that these cases contain these quotations. However, these quotations do not exist in the case cited. Since Petitioner has included numerous inaccurate quotations in their Petition. These incorrect citations should be ignored and not considered by the Court.

CONCLUSION

This matter simply does not meet the requirements for review by the Supreme Court. It is clear from Petitioners' Petition for Writ of Certiorari that they are simply unhappy with the determinations of the Todd County District Court, the Minnesota Court of Appeals, and the Minnesota Supreme Court. They also appear to be unhappy with several of their attorneys. There are no conflicting decisions involving the United States Court of Appeals or the Minnesota Supreme Court. There has been no decision on an important federal question in this matter. Petitioners simply believe their have been erroneous factual findings, and possibly a misapplication of a rule of law. Such claims are rarely reviewed by the Supreme Court of the United States. Ultimately, this matter simply does not warrant review by the Supreme Court of the United States as Petitioners have not offered a compelling reason for review.

Respectfully submitted,

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